

Supreme Court, U.S.
FILED
No. 05 - 840 DEC 12 2005

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2005

DENNIS L. RODRIGUEZ,
Petitioner,

Vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
BUREAU OF DRIVER LICENSING,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

Allen C. Welch, Esquire
Counsel of Record for Petitioner
1101 North Front Street
Harrisburg, PA 17102
Telephone: (717)-350-1002

QUESTION PRESENTED FOR REVIEW

- I. WAS THE PETITIONER DENIED DUE PROCESS OF LAW, AS GUARANTEED HIM BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, WHEN THE RESPONDENT COMMONWEALTH'S AGENCY FAILED TO OFFER INTO EVIDENCE AGAINST HIM AT HEARING *DE NOVO* ANY EVIDENCE OF THE CONVICTION WHICH TRIGGERED THE ENHANCED PUNISHMENT (EXTENDED OPERATOR'S LICENSE REVOCATION) WHICH WAS IMPOSED UPON HIM?

LIST OF PARTIES TO THIS PROCEEDING

Petitioner Dennis L. Rodriguez,
By and through Counsel of Record:
Allen C. Welch, Esquire
1101 N. Front Street
Harrisburg, PA 17102
Phone: (717)-234-4583

Respondent Commonwealth of Pennsylvania,
Department of Transportation,
By counsel for the agency:
Andrew S. Gordon, Esquire
Chief Counsel
Riverfront Office Center, Third Floor
1101 South Front Street
Harrisburg, Pa 17104-2516

TABLE OF CONTENTS

	<u>Page</u>
REFERENCE TO OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES	3
STATEMENT OF THE CASE	4
REASONS FOR ALLOWANCE OF WRIT	6
STATEMENT OF REASONS RELIED UPON	8

Appendix

Order of the Supreme Court of Pennsylvania, dated September 14, 2005, denying Allowance of Appeal	10
Unreported Memorandum Opinion of the Commonwealth Court of Pennsylvania, dated November 8, 2004, affirming the judgment of the Court of Common Pleas of Dauphin County which suspended Petitioner's Operating privileges, including Order and dissenting Opinion	11
Order and Opinion of the Court of Common Pleas of Dauphin County, Pennsylvania, B. F. Bratton, J., dated March 29, 2004, denying Petitioner's appeal of the suspension of his driving privileges imposed by Respondent department	24

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
Department of Driver Licensing v. Sutton, 541 Pa. 35, 660 A.2d 46 (1995)	7
Dunn v. Department of Transportation, 819 A.2d 189 (Pa. Cmwlth. 2003)	7
Harrington v. Department of Transportation, Bureau of Driver Licensing, 563 Pa. 565, 763 A.2d 386 (2000)	7
Hatzai v. Department of Transportation, Bureau of Driver Licensing, 686 A.2d 48 (Pa. Cmwlth. 1996)	7
<u>Constitutional Provisions and Statutes</u>	
Fifth Amendment to the United States Constitution	3
Fourteenth Amendment to the United States Constitution	3
28 U.S.C. 1257 (a)	2
28 U.S.C. 1651	2
75 Pa. C.S.A. 1542	4
75 Pa. C.S.A. 3802	4

REFERENCE TO OPINIONS BELOW

There have been two opinions delivered in this case, and neither has been published.

The unpublished trial court Opinion of the Honorable Bruce F. Bratton, Judge of the Court of Common Pleas of Dauphin County, Pennsylvania, dated March 29, 2004, is reproduced in the Appendix hereto at page 24.

The majority and dissenting Opinions of the Commonwealth Court of Pennsylvania, also unpublished (table notation of the entry of these Opinions is reported at 862 A.2d 757 (2004)(Table)), are reproduced in the Appendix hereto at page 11.

The per curium Order denying Allowance of Appeal entered by the Supreme Court of Pennsylvania is referenced at 882 A.2d 1007 (2005)(Table) and is also reproduced in the Appendix hereto at page 10.

CONCISE STATEMENT OF THE BASIS OF JURISDICTION

This petition for a writ of certiorari is from the denial of a petition for allowance of appeal by the Supreme Court of Pennsylvania on September 14, 2005, which effectively affirmed Petitioner's rejection of his appeal from a suspension of his driving privileges by Respondent state agency. It claims that he was denied due process of law. As such, this Honorable Court has jurisdiction pursuant to 28 U.S.C. 1257 (a) and 28 U.S.C. 1651.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fifth Amendment to the United States Constitution

“No person shall be . . . deprived of life, liberty, or property, without due process of law [.]”

Fourteenth Amendment to the United States Constitution

“Section 1. . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .”

STATEMENT OF THE CASE

This Petition arises from the revocation¹ of Petitioner's driving privileges for a five-year period pursuant to Pennsylvania's Habitual Offender statute, found in the Pennsylvania Vehicle Code, 75 Pa. C.S.A. 1542². That statute provides that any person found to be in violation of any of a number of enumerated offenses three times within a five-year period be subject to an extended period of revocation of their operating privileges for a five-year period. Driving Under the Influence³ is one of those enumerated offenses.

Petitioner Rodriguez was arrested for DUI on February 8, 1997, July 4, 1997, and July 6, 2001. As such he "committed" the acts necessary to be adjudicated a "habitual offender." However, the last offense, was the subject of dispute because of the failure of the Respondent to properly present to the trial court evidence of this third offense; in fact, petitioner had entered a plea of guilty to that offense on April 8, 2002, but was allowed to withdraw that plea on August 29, 2002. He later, on January 13, 2003, entered another plea of guilt to the offense.

The procedure for the imposition of such a suspension is written notice from the Respondent, from which there is an opportunity to appeal that action to the Court of Common Pleas, and this was done in a timely fashion. That action results in the first formal opportunity to be heard in such cases, generating a hearing de novo whereat the Respondent bears the burden of proving, by presentation of competent evidence, that the target of the suspension does, in fact, have the requisite violations to support the imposition of the enhanced suspension penalty. This

¹ There is confusion regarding the actual action taken by the Department. In fact Petitioner's operating privileges were revoked for five years, rather than suspended as is often stated by the courts in their opinions. For purposes of this Petition the distinction means nothing.

² 75 Pa. C.S.A. 1542 provides, in part, that a "habitual offender" "shall be any person whose driving record, as maintained in the Department, shows that such person has accumulated a requisite number of convictions . . . committed . . . within any period of five years . . ."

³ Formerly 75 Pa. C.S.A. 1542, now 75 Pa. C.S.A. 3802.

is most easily and commonly done by presenting to the Court a certified copy of the driving record of the subject motorist; that evidence is suggested by the language of the statute providing that the convictions appear in the "driving record, as maintained in the Department."

However, at hearing before the Court of Common Pleas of Dauphin County, on his appeal from the suspension, the Department offered as evidence a certified copy of the driving record of the Petitioner that was erroneous. It reflected the entry of the August 29, 2002, plea to the third DUI offense which plea was, in fact, withdrawn. Simply put, the driving record offered as evidence against Petitioner showed only two offenses for which he was convicted. There was nothing presented by Respondent to evidence the January 13, 2003, plea of guilty.

The right to due process of law is guaranteed by the Fifth Amendment of the Constitution, and further guaranteed in this state action by the Fourteenth Amendment.

The Department bears the burden of proving the existence of the requisite three convictions within five years to allow the mandated suspension to take effect; this is the simple process due the Petitioner in this matter.

Yet the Court of Common Pleas of Dauphin County, and the Commonwealth Court of Pennsylvania, both failed to grasp this argument, with the notable exception of Senior Commonwealth Court Judge James R. Kelley, who, in dissent, took exception with the other two judges of the Court for failing to see the simplicity of it.

Petitioner asked the Supreme Court of Pennsylvania to hear further appeal, and they declined on September 14, 2005; this timely Petition followed.

ARGUMENT

The essence of the argument in this case can be very briefly summarized as follows: Petitioner had two DUI convictions in a brief period of time, and a third would result in an enhanced five-year revocation of his driving privilege. He received the third on July 6, 2001, and entered a plea of guilt to that offense on April 8, 2002, but then was allowed to withdraw his plea. Later, on January 13, 2003, he entered another plea of guilt to that charge. As a result, Pennsylvania's Department of Transportation revoked his driving privileges, and he appealed.

At hearing *de novo* in the trial court, Respondent failed to produce any evidence of the January 13, 2003 conviction. He appealed that decision to Commonwealth Court of Pennsylvania, where a panel of three judges ruled, 2-1, to affirm the trial court.

The argument is whether or not the certified driving record entered into evidence by Respondent at the hearing *de novo* was merely a minor error, or whether it was a defect so great as to deprive Petitioner of due process as guaranteed by the Fifth Amendment.

The argument herein was well stated by Senior Judge Kelley of the Commonwealth Court of Pennsylvania, in footnote 9 of his dissent, contained in the Appendix hereto. It follows in loosely paraphrased form:

The Majority of the Commonwealth Court panel found that the Respondent Department's presentation of a certified driving record containing the incorrect date of conviction was just a minor error which would not justify the overturning of Petitioner's license revocation. However, in doing so, the majority failed to grasp what had truly and fully occurred: that the Department had totally failed to offer the correct notice of revocation underlying the appeal itself, nor any evidence of the conviction supporting that revocation. The certified copy of the notice of revocation of May 3, 2002, and certified copy of the conviction of April 8, 2002, that were offered by the Department at the hearing were, at that point, null and void as Rodriguez had

withdrawn his guilty plea, entered a new guilty plea on January 13, 2003, and the Department had issued a new revocation notice of July 24, 2003 which was the subject of the appeal. **Such an omission on the Department's part implicates the fundamental guarantee of due process and can never be deemed to be a "minor error."** See, e.g., *Dunn v. Department of Transportation*, 819 A.2d 189, 192-193 (Pa. Cmwlth. 2003) ("[I]t is true that immaterial or technical defects in a notice of license suspension will not be grounds for reversing a suspension. *Department of Driver Licensing v. Sutton*, 541 Pa. 35, 660 A.2d 46 (1995) (one-day discrepancy as to date of refusal to take blood test is curable, technical defect); *Hatzai v. Department of Transportation, Bureau of Driver Licensing*, 686 A.2d 48 (Pa. Cmwlth. 1996) (incorrect citation to vehicle code, instead of controlled substances act, was immaterial error when notice stated correct date of conviction for single offense). In contrast, this case presents a rare and egregious combination of incorrect dates of both violations and convictions and a seven-year delay in issuing notices of suspension, not all of which, however, may be chargeable to the Department. Moreover, this case is not one in which the relevant notices contained minor, technical errors. See *Harrington v. Department of Transportation, Bureau of Driver Licensing*, 563 Pa. 565, 763 A.2d 386 (2000) (failure of New Jersey report and Pennsylvania suspension notice to note driver's plea or whether conviction resulted from forfeiture of security did not violate due process when notice correctly reference the conviction and its date and notified driver of equivalent DUI provision and statutory authority for suspending his license).").